6

DISTRIBUTED
MAR 12 1992

No. 91-996

Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CESAR ELIAS CRIBAS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN,
Attorney General of the
State of California
GEORGE WILLIAMSON,
Chief Deputy Attorney General
GARY W. SCHONS,
Sr. Assistant Attorney General
FREDERICK R. MILLAR, JR.,
Supervising
Deputy Attorney General
PAMELA A. RATNER,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6986

Counsel for Petitioner
State of California

TABLE OF CONTENTS

Page

ARGUMENT

I. THE PETITION CONTAINS NO FACTUAL ERROR AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION PROPERLY RAISED IN THE STATE COURT 1

II. THE STATE COURT DECISION RESTS ON FEDERAL LAW 6

III. RESPONDENT'S INSISTENCE THAT EVIDENCE OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT IS INADMISSIBLE FOR ALL PURPOSES, INCLUDING IMPEACHMENT, AND HIS RELIANCE ON MICHIGAN CASE LAW, DOES NOTHING MORE THAN CONFIRM THE FACT THAT THE ISSUE WARRANTS CERTIORARI REVIEW 14

IV. THIS COURT MAY INDEPENDENTLY REVIEW FACTS THAT ARE INTERMINGLED WITH LEGAL CONCLUSIONS WHEN DECIDING A SUBSTANTIAL FEDERAL QUESTION 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASE	Page
Ashcraft v. Tennessee, 322 U.S. 143 (1944)	19
Blackburn v. Alabama, 361 U.S. 199 (1960)	19
California v. Carney, 471 U.S. 386 (1985)	11
California v. Ramos, 463 U.S. 992 (1983)	14
Chambers v. Florida, 309 U.S. 227 (1940)	19
Chapman v. California 386 U.S. 18 (1967)	9
Coleman v. Thompson ___ U.S. ___, 115 L.Ed.2d 640, 59 U.S.L.W. 4789 (1991)	12
Fiske v. Kansas, 274 U.S. 380 (1927)	19
Haynes v. Washington, 373 U.S. 503 (1963)	19
Martinez v. United States, 566 A.2d 1049 (D.C. App. 1989)	16
Massiah v. United States, 377 U.S. 201 (1964)	1, 4, 7, 9
Michigan v. Harvey, 494 U.S. ___, 108 L.Ed.293, 110 S.Ct. 1176 (1990)	5, 8

Michigan v. Long,
463 U.S. 1032 (1983) 11, 12

Mincey v. Arizona,
437 U.S. 385, (1978) 18

Napue v. Illinios,
360 U.S. 264 (1958) 19

Orr v. Orr,
440 U.S. 268 (1979) 13

People v. Bacino,
41 Ill.App.3d 738,
354 N.E. 2d 641 (1976) 16

People v. Cribas,
231 Cal.App.3d 596,
282 Cal. Rptr. 538 (1991) 13

People v. Gonyea,
421 Mich. 462,
365 N.W.2d 136 (1984) 14, 15

People v. Harper,
228 Cal.App.3d 843,
29 Cal. Rptr. 204 (1991) 12, 13

People v. Ricco,
56 N.Y.2d 320,
437 N.E.2d 1097 (1982) 16

People v. Whitt
36 Cal.3d 724,
205 Cal. Rptr. 810 (1984) 7, 9, 10

State v. Swallow,
405 N.W.2d 29 (S.D. 1987) 16

State v. Thomas,
698 S.W.2d 942 (Mo.App. 1985) 16

Stein v. New York,
346 U.S. 156 (1953) 18

Tate v. United States,
283 F.2d 377 (1960) 16

United Air Lines v. Mahin,
410 U.S. 623 (1973) 13

United States v. Brown,
699 F.2d 585 (2d Cir. 1983) 15

United States v. Frank,
520 F.2d 1287 (2d Cir. 1975) 16

United States v. McManaman,
606 F.2d 919 (10th Cir. 1979) 16

Washington v. Chrisman
455 U.S. 1 (1982) 9

CONSTITUTIONS

United States Constitution
Fourth Amendment 16
Fifth Amendment 16
Sixth Amendment et passim

STATUTES

28 United States Code
§ 1257, subd. (a) 6

ARGUMENT

I

THE PETITION CONTAINS NO FACTUAL ERROR AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION PROPERLY RAISED IN THE STATE COURT

The Brief in Opposition to the Petition for Writ of Certiorari states that the Petition contains factual error. Respondent attaches pages from the reporter's and clerk's transcript, taken out of context, in an attempt to cast doubt on the adequacy of the state court record. (RB 2.) The petition contains no factual error and presents a substantial federal question properly raised in the state court.

Initially, respondent sought to suppress the statements made by him in a taped telephone call as obtained in violation of the Sixth Amendment right to counsel and Massiah v. United States, 377 U.S. 201 (1964). (CT 254-260.) However, at the hearing on the motion, the

prosecution made clear that it was proffering those statements solely for purposes of impeachment, should respondent testify. (See RT 18-19; see also, state court opinion at, Appen. to Pet. A-11, A-12.)

Specifically, when questioned by the trial court, the prosecutor stated:

> ". . . [W]e're not seeking to admit them in . . . the prosecution's case in chief. The People however don't feel that they should be precluded from using these statements on either cross-examination or rebuttal should the defendant testify. [¶]
>
> "It's the People's position that even if the statements are excluded under the 6th Amendment, that based upon the history of the courts in determining that [sic] exclusionary remedy really only affects statements being used in the People's case in chief, that the court should allow the People, should the defendant testify, to either impeach him with those statements or present those statements in rebuttal.
>
> "However, if [the court finds] they were involuntary, the court would have to make a finding -- it's the People's position the court would have to

> find [in such a case] those statements . . . [are] not usable [sic] for any purpose." (RT 18-19.)

Subsequently, respondent's motion was denied and the court ruled the statements were admissible. The trial court found the statements were voluntarily made and not taken in violation of the Sixth Amendment. (See CT 276, see also, Appen. to Pet. A-11, A-12.) The statements were thereafter employed by the prosecution solely to impeach respondent when he testified. (RT 301-302.)[1]

---

[1] We note further that, in the prosecution's case-in-chief, the tape recording and the transcript of the tape recording were marked as exhibits and were admitted for purposes of later impeachment. However, and as the prosecutor stated, in the event, respondent did not testify, or there was an absence of evidence presented in the defense which would warrant use of the statements on rebuttal, the statements made by respondent pertaining to the rape charge would be deleted from the tape and transcript of the tape, because the statements were being admitted solely for impeachment purposes. (RT 313; see also, Appen. to Pet. A-22.)

In the California Court of Appeal, Fourth Appellate District, Division Three, respondent contended statements he made to the victim were obtained in violation of the Sixth Amendment to the federal Constitution and Massiah v. United States, supra, 377 U.S. 201, and were accordingly improperly admitted. Petitioner argued that respondent's statements were not obtained in violation of the Sixth Amendment and, in any event, the evidence was appropriately admitted for impeachment.

On June 21, 1991, in a published opinion, the California Court of Appeal reversed respondent's forcible rape conviction, holding that respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, and such illegally obtained evidence could not be used for any purpose including for

the purpose of impeachment.[2] (Appen. to Pet. A-23, citing Michigan v. Harvey, 494 U.S. ___, 108 L.Ed.293, 110 S.Ct. 1176 (1990), see also, Appen. to Pet. A-24, A-25.)

Thereafter, petitioner filed a petition for review in the California Supreme Court, the state's highest court, arguing that the Court of Appeal improperly held as a matter of law that statements obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. Petitioner further argued that under Michigan v. Harvey, supra, 494 U.S. ___, 108 L.Ed.2d 223, respondent's statements could properly be used against him for impeachment purposes, and the exclusionary rule should not bar

---

[2] It should be noted the court iterated the sought and admitted purpose was indeed for impeachment. (Appen. to Pet. A-11, A-12, A-22.)

the use of illegally seized evidence to impeach a criminal defendant.

On September 26, 1991, the California Supreme Court denied the petition for review, making the decision of the Court of Appeal a final judgment under 28 U.S.C. section 1257, subdivision (a), for purposes of seeking this Court's certiorari jurisdiction.

The petition for writ of certiorari, filed with this Court, contains no factual misstatement or error. Instead, the petition presents a substantial federal question, which was properly raised in the state court.

II

THE STATE COURT DECISION RESTS ON FEDERAL LAW

Respondent misleads this Court by erroneously stating the state court decision in the instant case rests on independent state grounds; he bases his argument on a citation by the state court

to People v. Whitt, 36 Cal.3d 724, 205 Cal. Rptr. 810 (1984). (See RB 6.) The express language of the state court opinion, itself, reveals respondent's argument is meritless. Moreover, the state court cited People v. Whitt, supra, merely as state law entirely consistent with federal law on the question of whether there was in fact a Sixth Amendment violation here, a question petitioner does not seek to challenge through certiorari.

The decision by the California Court of Appeal presents a clear cut federal question. That question is whether evidence obtained in violation of the Sixth Amendment of the Constitution, as interpreted in Massiah v. United States, supra, 377 U.S. 201, may be used for impeachment purposes. (See Appen. to Pet. A-23, A-28.)

The California Court of Appeal ruled that because respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, simply and unequivocally, rather than in violation of "`only a prophylactic rule,'" (relying on an interpretation of this Court's decision in Michigan v. Harvey, supra, 494 U.S. ___, 108 L.Ed. 2d 293, 110 S.Ct. 1176), the statements were improperly admitted, notwithstanding the fact that they were used only to impeach. (Appen. to Pet. A-23, A-24, A-25.) The state court concluded that statements taken in violation of "`only a prophylactic rule'" may be used for impeachment purposes, however statements taken simply and unequivocally in violaton of the Constitution cannot be used for any purpose, including for the purpose of impeachment. (Appen. to Pet. A-23, A-24, A-28.)

In determining that respondent here was prejudiced by the admission of evidence obtained from a Massiah violation for impeachment purposes, the state court employed the harmless error test of Chapman v. California, 386 U.S. 18 (1967). (See Appen. to Pet. A-25.)

In sum, the state court opinion yields precise answers as to the grounds of its decision. There is no need, here, to resort to abstract analysis in order to determine whether there is an independent basis for the court's decision. (See, e.g., Washington v. Chrisman, 455 U.S. 1, 5, fn. 2 (1982).)

Respondent asserts that the state court, in citing People v. Whitt, supra, 36 Cal.3d 724, 741, based its decision on independent state grounds in holding that evidence seized in violation of the Sixth Amendment was not admissible for

impeachment purposes. (See RB 6.) Such an assertion is entirely baseless.

Instead, People v. Whitt, supra, was cited by the state court merely as state law entirely consistent with federal law on the question of whether there was, in fact, a Sixth Amendment violation here. (Appen. to Pet. A-17, A-20.) As pointed out in the Petition, we do not challenge the California Court of Appeal decision finding there was a violation of the Sixth Amendment to the Constitution. (See Pet. 20, fn. 5.)

Even if there were an evident state ground iterated in the opinion, which is not the case here, that would not end the inquiry. In determining whether state court references to state law constitute adequate and independent state grounds, the Court no longer conducts an independent investigation of state law or requires state courts to reconsider cases

to clarify the grounds of their decisions. (Michigan v. Long, 463 U.S. 1032, 1040 (1983).) Now, when

> "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." (Michigan v. Long, supra, 1040-1041; see also, California v. Carney, 471 U.S. 386, 389 fn. 1 (1985).)

Were the opposite true, Supreme Court review could be defeated merely by raising on the record some state law point, however inadequate or erroneous, and then suggesting that the state court may have based its decision thereon.

Accordingly, after Long, a state court wishing to look to federal law for guidance or as an alternative holding, while still relying on an independent and

adequate state ground, avoids the presumption currently employed in determining the application of the independent and adequate state ground doctrine, by stating,

> "'clearly and expressly that [it's decision] is . . . based on bona fide separate, adequate, and independent grounds.'" (Coleman v. Thompson, ___ U.S. ___, 115 L.Ed.2d 640, 59 U.S.L.W. 4789, 4792 (1991), citing Michigan v. Long, supra, 463 U.S. at 1041.)

Here, there was no explicit statement of independent grounds. Indeed, the California Court of Appeal's only reference to state law pertaining to the federal question presented on the issue of whether evidence obtained in violation of the Sixth Amendment is admissible for impeachment purposes, is People v. Harper, 228 Cal.App.3d 843, 851, 29 Cal. Rptr. 204 (1991); however, that decision, like the Court of Appeal's decision here, derived its principles by reference to federal

constitutional decisions by this Court. (People v. Harper, supra, 228 Cal.App.3d at 849-853; People v. Cribas, 231 Cal.App.3d 596, 606, 282 Cal. Rptr. 538 (1991).)

Moreover, assuming respondent's argument suggested the existence of independent state grounds, respondent has made no attempt to show the adequacy of such grounds. The mere

> "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." (United Air Lines v. Mahin, 410 U.S. 623, 630-631 (1973); and see Orr v. Orr, 440 U.S. 268 (1979).)

Therefore, when the Court is convinced, from its own examination of the opinion, that the state court judgment rests on federal grounds, the fact that the state court

> "might have, but did not, invoke state law does not foreclose jurisdiction. . . ." (California v. Ramos, 463 U.S. 992, 997-998 fn. 7 (1983).)

Based on the foregoing, the state court decision does not rest on adequate and independent state grounds but, instead, on its face, the decision explicitly adjudicates a federal constitutional claim.

III.

RESPONDENT'S INSISTENCE THAT EVIDENCE OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT IS INADMISSIBLE FOR ALL PURPOSES, INCLUDING IMPEACHMENT, AND HIS RELIANCE ON MICHIGAN CASE LAW, DOES NOTHING MORE THAN CONFIRM THE FACT THAT THE ISSUE WARRANTS CERTIORARI REVIEW

Respondent argues that his statements, secured in violation of his right to counsel pursuant to the Sixth Amendment, were inadmissible for all purposes, including for purposes of impeachment. (RB 4.) He relies upon People v. Gonyea, 421 Mich. 462, 477-483,

365 N.W.2d 136, 143-145 (1984), a Michigan Supreme Court case. (RB 4.) Respondent's argument merely confirms that there is a conflict between lower courts on this issue.

Specifically, lower courts are divided on whether statements obtained in violation of the Sixth Amendment are admissible for impeachment. Some state and federal courts have taken the approach that a separate set of Sixth Amendment principles should apply that always results in suppression of the illegally seized evidence for impeachment. (See, e.g., United States v. Brown, 699 F.2d 585, 588-591 (2d Cir. 1983); see also, People v. Gonyea, supra, 421 Mich. 477-483, 365 N.W.2d 136, 143-145.)

However, a number of state and federal courts have decided that such evidence can in fact be introduced as impeachment evidence, just as evidence

obtained in violation of the Fourth and Fifth Amendments can be introduced and for the identical reasons. (See e.g., Martinez v. United States, 566 A.2d 1049, 1057 (D.C. App. 1989); State v. Swallow, 405 N.W.2d 29, 39-41 (S.D. 1987); State v. Thomas, 698 S.W.2d 942, 947-949 (Mo.App. 1985); People v. Ricco, 56 N.Y.2d 320, 437 N.E.2d 1097, 1100 (1982); United States v. McManaman, 606 F.2d 919, 924-925 (10th Cir. 1979); United States v. Frank, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); People v. Bacino, 41 Ill.App.3d 738, 739, 354 N.E. 2d 641, 642 (1976); Tate v. United States, 283 F.2d 377, 379 (1960).)

Accordingly, respondent's argument merely supports a conclusion that certiorari should be granted to resolve the conflict which exists in the lower courts as to the question of whether statements obtained in violation of the

Sixth Amendment can be used for impeachment.

IV.

THIS COURT MAY INDEPENDENTLY REVIEW FACTS THAT ARE INTERMINGLED WITH LEGAL CONCLUSIONS WHEN DECIDING A SUBSTANTIAL FEDERAL QUESTION

Respondent argues his statements were not "`otherwise voluntary and trustworthy'" on their face and cites the California Court of Appeal's opinion in support of his position. On this basis, he argues the Petition should be denied. (RB 3-4, 7.)

First, whether or not the statements are voluntary and trustworthy is a question of constitutional fact bearing on a legal issue which this Court may review in entertaining a substantial federal question. Specifically, if the Court is to meet its constitutional responsibilities, it cannot permit itself to be

> "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." (Stein v. New York, 346 U.S. 156, 181 (1953).)

For this reason, respondent's argument alluding to a mixed question of fact and law does not defeat this Court from exercising its jurisdiction.

It is true this Court will not exercise jurisdiction merely to review a decision of a state court upon a question of fact. However, the Court may make an independent examination of facts that are intermingled with legal conclusions when necessary to decide whether a person has been deprived by a state court of a right secured by the federal Constitution. Moreover, the areas that are subject to this kind of Supreme Court assessment include findings by state courts as to the coerciveness or voluntariness of a confession. (Mincey v. Arizona, 437 U.S.

385, 398 (1978); Blackburn v. Alabama, 361 U.S. 199, 205-210 (1960); Ashcraft v. Tennessee, 322 U.S. 143, 147-148 (1944); Chambers v. Florida, 309 U.S. 227, 228-229 (1940); Haynes v. Washington, 373 U.S. 503, 515-516 (1963).)

In short, this Court will review a state court's finding of fact where a conclusion of law as to a federal right and a finding of fact may be so intermingled as to make it necessary to do so, in order to pass upon a substantial federal question. (See Fiske v. Kansas, 274 U.S. 380, 385-386 (1927); see also, Napue v. Illinios, 360 U.S. 264, 272 (1958).)

Such is the case here where any conclusions by the state court as to the coerciveness or voluntariness of the statements are necessarily intermingled in an evaluation of the federal question.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal in this case.

Dated: March 4, 1992.

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON,
Chief Assistant Attorney General

GARY D. SCHONS,
Assistant Attorney General

FREDERICK R. MILLAR, JR.,
Supervising Deputy Attorney General

Pamela A. Ratner

PAMELA A. RATNER,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7766

Counsel for Petitioner
State of California

PAR:ar
SD90DA0447

AFFIDAVIT OF SERVICE BY MAIL

No. October Term, 1991

Attorney:

DANIEL E. LUNGREN
Attorney General of
the State of California
FREDERICK R. MILLAR, JR.,
Supervising Deputy Attorney General
PAMELA A. RATNER,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

THE STATE OF CALIFORNIA,

Plaintiff,

v.

CESAR ELIAS CRIBAS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Clerk, California Supreme Court
3580 Wilshire Blvd.
Los Angeles, California 90010

Charles R. Khoury, Jr.
Attorney at Law
P. O. Box 1066
Wilton, N.H. 03086

Court of Appeal
Fourth Appellate District, Division 3
925 N. Spurgeon Street
Santa Ana, CA 92701

Appellate Defenders, Inc.
233 A Street, Suite 1310
San Diego, CA 92101

Michael R. Capizzi
District Attorney
P. O. Box 808
Santa Ana, CA 92702-0808

Hon. Richard J. Beacom, Judge
c/o Gary L. Granville, County Clerk
700 Civic Center Drive West
Santa Ana, CA 92701

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California on the 9th of March 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 9, 1992.

Arlene M. Ryan
ARLENE M. RYAN

Subscribed and sworn to before me
this 9th day of March 1992.

Anne Marie Bogard
Notary Public in and for said County and State